Systemic Factors Affecting the Quality of Criminal Defense Representation

PRELIMINARY REPORT

by
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Primary Provider

- Public Defender
- Contract Defender
- Assigned Counsel Program

TABLE OF CONTENTS

I. Executive Summary 1
  A. Objectives of this Report 1
  B. Summary of Methodology 1
  C. Most Significant Finding 2
  D. Recommendations 4
    1. Recommendations for Improving Criminal Defense Investigation 4
      1.1 Appointment of Investigator 4
      1.2 Discovery 4
      1.3 Preliminary Hearing 5
      1.4 Depositions 7
      1.5 Center for Indigent Defense Services 7
      1.6 Forensics Laboratory 8
      1.7 Pre-Arraignment Representation 9
    2. Recommendations for Improving the Judiciary 9
      2.1 Judicial Training 9
    3. Recommendations for Indigent Defense Contracts 10
      3.1 Contract Terms to Safeguard Effective Representation 10
      3.2 Prohibition of Flat Fee Contracts 10
    4. Recommendations for Public Defenders and Assigned Counsel Systems 10
      4.1 Parity with Prosecution 10
      4.2 Assigned Counsel Compensation 11
II. Judicial Decisions on Ineffective Assistance of Counsel (IAC) 11
  A. Cases Finding Deficient Performance 11
  B. Data from Judges and Certified Specialists 14
III. Resources for Indigent Defense 15
IV. Data from Public Defender Offices 20
  A. Excessive Workloads 20
    1. Staff Attorneys 20
    2. Investigators 22
  B. Time of First Contact 23
  C. Reinstatement of the Traditional Preliminary Hearing 26
  D. DNA and other Forensic Testing 27
  E. Expert Witnesses 27
  F. Assistance in Sentence Mitigation 28
  G. Training 28
  H. Qualifications and Supervision 28
  I. Independence 29
  J. Comments of Defenders 29
V. Data from Contract Defenders 30
VI. Assigned Counsel Systems 34
VII. Conlusion 35

LIST OF FIGURES

Figure 1. Most Frequent Performance Deficiency 2
Figure 2. Inability to Interview Prosecution Witnesses 3
Figure 3. Views of Certified Criminal Defense Specialists 6
Figure 4. Support for Independent Forensics Lab 8
Figure 5. Average Per Capita Disparity between Prosecution and Defense Budgets 18
Figure 6. Excessive Attorney Caseloads 21
Figure 7. First Contact with Indigent Accused 24

LIST OF TABLES

Table 1. Deficient Performance Claims 12
Table 2. Deficiencies Observed by Judges and Criminal Defense Specialists 14
Table 3. Yolo County Resource Comparison 16
Table 4. Per Capita Disparities between Defense and Prosecution Budgets by Population Class 17
Table 4a. Average Disparity for each Population Class 17
Table 5. Comparison between El Dorado and Humboldt Counties 18
Table 6. Per Capita Disparity by Type of Provider 19

LIST OF APPENDICES

APPENDIX I – Response from Counties
APPENDIX II – Population Map of California Counties
APPENDIX III – IAC Cases where Deficient Performance Found

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I. Executive Summary

A. Objectives of this Report:

The objective of this Preliminary Report is to assist the Commission in answering the focus questions to be addressed in the Public Hearing on July 11, 2007. Because the Commission's time at this hearing will be divided between two important issues (compliance by prosecutors with their discovery obligations and the quality of representation by defense counsel) this report will focus only on major findings pertaining to both issues. The Final Report will be delivered by August 15, 2007 as previously agreed.

B. Summary of Methodology[1]

Data was obtained about our criminal justice system from 44 (76%) of the 58 counties in California using a variety of methods. Providers of indigent defense services from 67% of the counties responded to our questionnaires. This included public defenders, contract defenders and assigned counsel systems. We also received responses from 109 certified criminal defense specialists in 21 counties and responses from 38 judges. See **Appendix I** for a list of counties from which responses were received. Statistical data was also collected concerning felony and misdemeanor filings, and comparative budget information obtained for each county regarding the amount spent on indigent defense and prosecution. An analysis of ineffective assistance of counsel cases from the last ten years was also conducted. Undertaking these tasks would not have been possible without the assistance of the students in my Advanced Criminal Justice class[2] who helped in gathering the data and in following up by telephone to promote the return of questionnaires.[3]

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[1] This study focused primarily upon defense representation in felony and misdemeanor cases. Because the juvenile justice system deserves a separate study devoted exclusively to its unique issues, this study did not undertake to assess juvenile defense representation.

[2] Alex Avakian, Kitty A. Baker, Lance, D. Banks, Drew A. Callahan, Solomon Chang, Wayland C. Chang, Jessica L. Coto, AnnaMarie F. Farrales, Kristina M. Hein, Victor J. Herrera, Joanna A. Hojdus, Matthew K. Izu, Taren Kern, Pritesh Kothary, Kristen B. Longo, Lindsey E. McGregor, Colleen Polak, Amber B. Rabon, Shelly D. Rowe-Krusic, Meghan L. Salmans and Martin Serra, and Lorenda S. Stern.

[3] The processing, organization and analysis of this massive amount of data would not have been possible, given the time constraints of this project, without the invaluable assistance of my research assistants, Lorenda S. Stern and Alex Avakian, who are also co-authors of this report. Special thanks also go to Matthew K. Izu, Taren J. Kern, Pritesh Kothary, Colleen Polak, and Meghan L. Salmans for exceptional assistance.

C. Most Significant Finding

The most important finding from our study is the discovery that criminal defense counsel in many counties lack the resources necessary to conduct the defense investigation required by the Constitution, and by both national and California State Bar standards. This finding is especially troubling because it concerns more than the technical right to a fair trial; it goes directly to the heart of guilt or innocence.

As **Figure 1** discloses, our study of ineffective assistance of counsel decisions reveals that in over one-half (54%) of the cases finding deficient performance, the error involved the failure to conduct a proper investigation.[4]

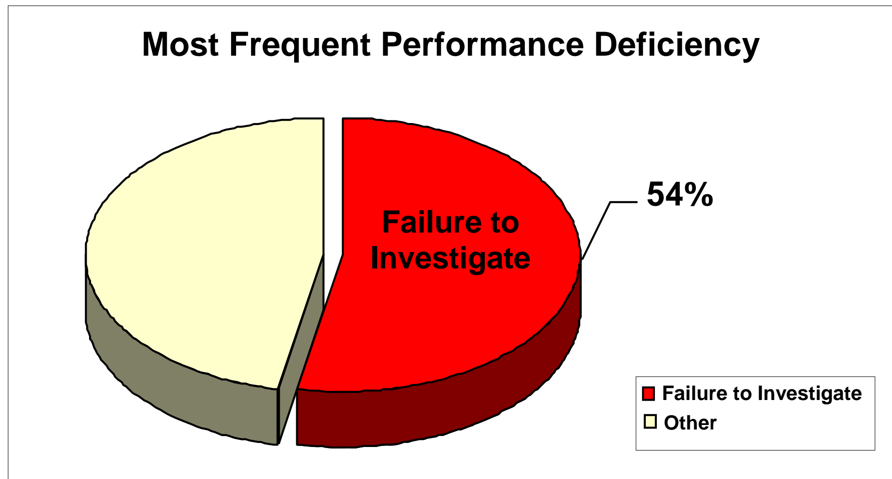

Figure 1.

Data from indigent defense providers, certified criminal defense specialists, and judges confirmed the lack of investigative resources throughout the state. Over two-thirds (69%) of the judges answering our questionnaire on this subject admitted that the lack of resources to investigate cases thoroughly was a problem for the indigent defense system in their county. Eighty nine percent (89%) of the responding certified criminal defense specialists also reported that the indigent defense system in their county lacked adequate investigative resources.

One hundred percent (100%) of the public defender offices and all but one of the contract defenders reported that excessive investigator workloads were a problem.[5] In six counties the defender had no staff investigators at all.[6] One contract defender, a solo practitioner in a rural county, complained he had difficulty investigating cases because the court would not appoint an

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[4] Because the identity of the attorney involved is rarely given by the court, additional research has been required to determine his or her status. Our analysis to date indicates that one-third (33%) of these failure to investigate cases involved privately retained counsel. Thirty percent (30%) involved a public defender. Seventeen percent (17%) involved assigned counsel. In the remaining cases (20%), the status of the attorney remains undetermined at this time.

[5] We have defined "public defender office" as a county department where the attorneys employed are salaried public employees. This type of office should not be confused with "contract defenders" who are also sometimes called public defenders. A contract defender is a solo practitioner or a law firm who acts as an independent contractor when negotiating with the county to handle indigent criminal cases. Contrasted with both of these providers is the "assigned counsel system" which appoints defense counsel for an individual case from a panel of private attorneys who have individual private practices.

[6] Two were public defender offices and four were contract defenders.

investigator unless it was a serious case. Not surprisingly while 59% of the certified specialists indicated that an investigator often, very often or always interviewed victims and eyewitnesses before a preliminary examination, only a little more than one-third (35%) of the indigent defense providers reported routinely conducting such interviews at this stage.

The problems created by the lack of investigatory resources have been exacerbated by the fact that prosecutors across the state are not complying with their discovery obligations. The overwhelming majority of both certified criminal defense specialists and indigent defense providers reported that prosecutors fail to turn over *Brady* evidence[7] and delay in turning over requested discovery. Ninety five percent (95%) of the certified specialists reported that they had difficulty interviewing prosecution witnesses in retained cases. More than one in four (29%) stated that this was a serious problem. Ninety nine percent (99%) of the indigent defense providers reported that this was a problem and one in five stated that it was a serious problem. **Figure 2** reflects the extent of the problem faced by public defender offices.[8]

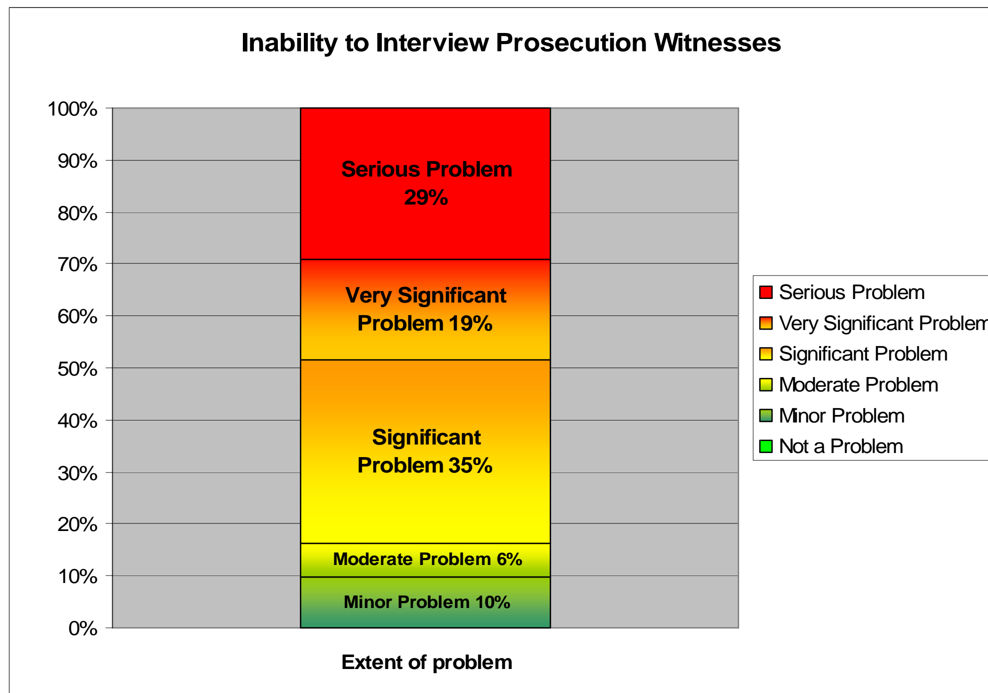

Figure 2.
Responses from Public Defender Offices.

It is often assumed that a defendant who is able to afford to hire an attorney will also have the funds necessary to conduct a proper investigation. However, we discovered that privately retained counsel also often lack sufficient funds to mount an effective challenge to the prosecution's case. Eighty percent (80%) of the certified criminal defense specialists reported they had difficulty obtaining DNA testing in retained cases. Almost two-thirds of the indigent

[7] Prosecutors have a constitutional duty to turn over evidence favorable to the accused, including evidence that could be used to impeach a prosecution witness. *Brady v Maryland*, 373 U.S. 83 (1963), *United States v Bagley,* 473 U.S. 667 (1985).

[8] Public Defenders were asked to rank how significant this problem was on the following five-point scale: 0=not a problem, 1=minor problem, 2=moderate problem, 3=significant problem, 4=very significant problem, 5=serious problem.

defense providers also indicated difficulty in obtaining DNA as well as other forensic testing. Both retained counsel (92%) and indigent defense providers (67%) reported that they were at a disadvantage compared to the prosecution in hiring expert witnesses because they lacked sufficient funds to match what the prosecution could pay for expert assistance.

Finally, it should be recognized that impact of the lack of adequate resources cannot be fully appreciated without understanding the pressurized environment in which defense counsel work on a daily basis. Over 90% of the indigent defense providers and 94% of certified criminal defense specialists reported that judicial pressure to expedite cases was a problem to some degree. Judicial pressure was not limited to just metropolitan counties, but existed in counties of all population sizes.[9] In almost one-half (45%) of the counties this was viewed as a significant problem.

D. Recommendations

In light of these findings and other findings revealing the glaring disparity between funding for the prosecution and funding for indigent defense, reported in detail below, it is proposed that the Commission recommend to the state legislature the following:

1. Recommendations for Improving Criminal Defense Investigation

Recommendation 1.1 - Appointment of Investigator

Amend Penal Code ("P.C.") § 987 to provide for automatic appointment at arraignment of a qualified investigator in all death penalty, special circumstances, three strikes and serious or violent felony cases.

> ***Commentary:***
> Unless defense counsel represents to the court that his or her client has sufficient funds to conduct an adequate investigation, or, if counsel is appointed, that the defender office or assigned counsel program has sufficient investigative resources to conduct an "in depth factual inquiry" mandated by California State Bar standards, the court should ensure that a proper investigation will be conducted by appointing a qualified investigator from a rotating list of licensed investigators certified by an appropriate authority as qualified to conduct criminal investigations.

Recommendation 1.2 - Discovery

Amend P.C. § 1054.7 to require the prosecution to promptly turn over all statutorily required discovery (P.C. § 1054.1) requested by defendant within five working days after arraignment, with a continuing duty to promptly disclose such information arising after that time. Prosecutors should be barred from making a "take it or leave it offer" until all discovery obligations have first been complied with and defense counsel has had adequate opportunity to interview or cross examine at the preliminary hearing all eyewitnesses and other key witnesses essential to establishing any controverted material fact necessary to establish an element of the crime charged.

[9] We have classified counties into 9 population categories. See **Appendix II**.

Commentary:
It is elementary that in order for defense counsel to comply with their duty to be competent and their duty to investigate, they must first have received and studied discovery requested from the prosecution. Yet 95% of the certified criminal defense specialists and 93% of the indigent defense providers reported that the lack of prompt discovery is a problem in their county. A similar percentage reported that withholding *Brady* evidence is also a problem. Moreover, about one-half of all indigent defense providers and one-half of all certified specialists indicated that the disposition of a felony case is most often determined at a disposition conference prior to the preliminary hearing. Therefore, as a practical matter, the existing time limitations under P.C. § 1054.7 (requiring disclosure 30 days prior to trial) render the prosecutor's disclosure obligations illusory in those cases where the case is disposed of shortly after arraignment. The recommendation thus seeks to bring the discovery rules in line with actual practice. Because most dispositions occur shortly after arraignment, the prosecutor should provide prompt discovery prior to that stage.

In view of the problems encountered in turning over *Brady* evidence, it is also proposed that P.C. § 1054.1(e) be amended to remove any ambiguity in defining this duty of disclosure by expressly defining "exculpatory evidence" to include any fact, opinion, claim, statement or report (whether verbal or written) and any tangible evidence that would be favorable to the accused with regard to either guilt or mitigation of punishment, or, which would be inconsistent with any fact, opinion, claim, statement, report or position that might reasonably be expected to be asserted by the prosecution at trial.

Finally, it is proposed that defense counsel shall have the right to continue any readiness conference, disposition conference or preliminary hearing, if discovery has not been promptly provided prior to that stage. Provision should also be made that any such continuance shall not be construed as a waiver of time and shall not be counted against the accused with respect to any statutory or constitutional right to a speedy trial.

Recommendation 1.3 - Preliminary Hearing

Amend P.C. § 872 to require that all eyewitnesses and any essential witness concerning a contested issue material to probable cause be called to testify at the preliminary hearing absent good cause.

Commentary:
This recommendation is not new. It essentially tracks the same recommendation made by the Los Angeles County Bar Association Task Force on the State Criminal Justice System in April 2003, following the Rampart scandal. In gutting the preliminary hearing to promote efficiency and convenience over justice, Proposition ("Prop.") 115 departed from a long historical tradition that ensured an accused would have the opportunity to test the prosecution's case at an early stage. As the Los Angeles Task Force observed:

> "The preliminary hearing should be more than a procedural nicety in which a court determines whether the face of a police report supplies probable cause to proceed to trial. All parties should use it as a reliable and efficient way to evaluate the testimony and evidence, as well as to judge the case's merits."

It was hoped that prosecutors would take the lessons learned from the Rampart scandal to heart and exercise their discretion to test the credibility and accuracy of key witnesses at the preliminary hearing, but this has not happened uniformly throughout the state. Over one-half of the indigent defense providers (57%) and certified specialists (62%) reported that key witnesses such as victims and eyewitnesses were rarely or only occasionally called at the preliminary hearing. The preliminary hearing has thus remained an empty ritual.

As **Figure 3** reveals, 95% of the certified criminal defense specialists agreed that giving defendants the right to cross examine key witnesses at the preliminary hearing would improve the effectiveness of defense representation; 83.5 % strongly agreed with this proposition. Only by bringing back the preliminary hearing as it existed prior to Prop. 115 will we be able to guarantee that all participants - the defense counsel, the district attorney and the court - will take an active role in examining the case against the accused at an early stage.

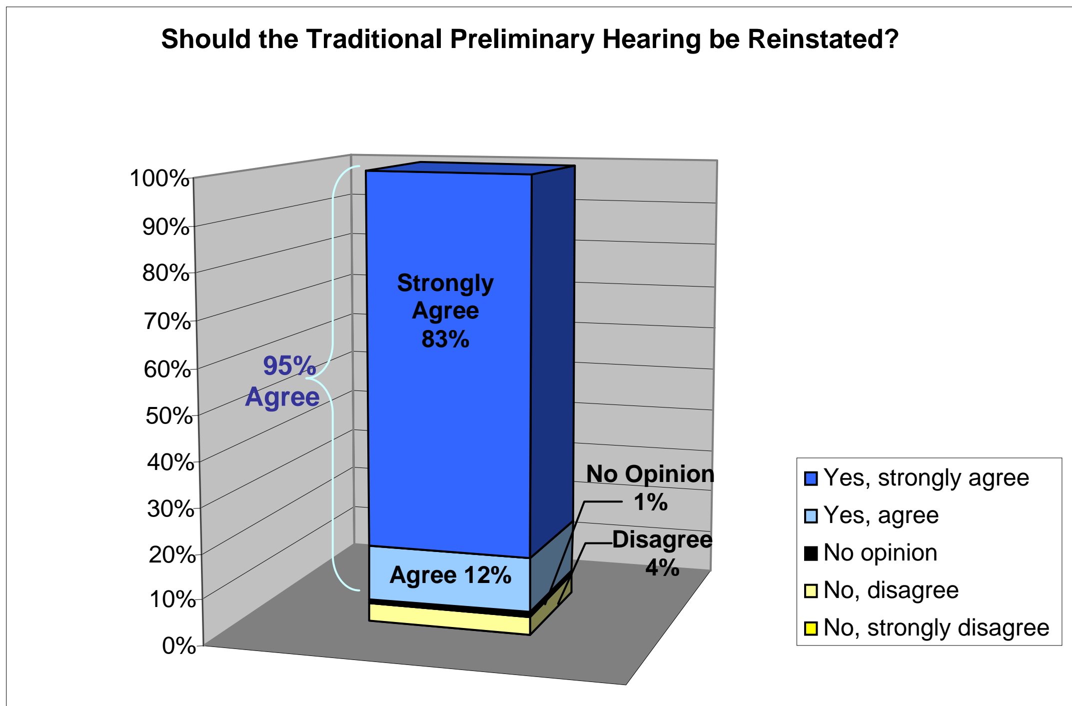

Figure 3.
Views of Certified Criminal Defense Specialists [10]

[10] The standards for certification by the State Bar of California as a criminal defense specialist require within the five years immediately preceding application, that counsel have: 1) five felony jury trials, 2) five additional jury trials regardless of the nature of the offense, 3) 40 additional criminal matters, and 4) any two of the following: a)

Recommendation 1.4 - Depositions

Amend P.C. § 1335 to provide that defense counsel may take depositions of prosecution witnesses.

Commentary:

In civil cases, where only money is at stake, depositions are routine. This recommendation is offered for the Commission's consideration as it could be useful in a number of ways, including as a sanction for late discovery and/or failure to call material witnesses at the preliminary hearing.

Recommendation 1.5 - Center for Indigent Defense Services

Establish a state funded Center for Indigent Defense Services to assist counties in bringing their system for delivering criminal defense services into compliance with National and State Bar standards.

Commentary:

a. Phase I. The Center would initially conduct an audit of the delivery systems in each county. This audit would primarily focus on the need for additional attorneys, investigators and other support personnel. Using time studies and other analytical tools the Center would determine and justify appropriate caseload levels for attorneys and investigators, given the unique circumstances of each county, including its geographic and demographic characteristics and its prosecutorial and judicial practices.

b. Phase II. The Center would then award matching grants covering 50% of the cost to the county for implementing appropriate caseload levels.

c. The Center would also assist in providing training for new attorneys, investigators and support personnel, and in rural areas would create regional backup service centers that would provide qualified investigators and sentencing mitigation specialists in death penalty, special circumstances and three strikes cases.

d. Funding for Phase I could be found by adding a $10.00 surcharge to the State bar dues paid by California lawyers. This would raise $2,104,720 to initially fund the Center's operation.

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five hearings on a motion to suppress evidence, and three extraordinary writ proceedings, or b) three appeals, or c) five additional jury trials. In addition the applicant must have references from practicing criminal defense lawyers, judges, and opposing counsel and within the last three years have completed 45 hours of training in criminal law and procedure, evidence and trial advocacy. To maintain certification counsel must demonstrate every five years that he or she has continued to try cases to a jury and has at least 60 hours of specifically approved training for criminal law specialists. n=109.

Recommendation 1.6 - Forensics Laboratory
Establish a state funded forensics laboratory that would be available to indigent defense providers, and privately retained counsel, to provide expert criminalists and conduct forensic testing.

Commentary:
In an adversary system which increasingly relies upon scientific evidence, it is imperative that an objectively neutral laboratory be available for the defense. The number of national scandals revealing corrupted laboratory technicians in state run crime labs underscores this point. Eighty eight percent (88%) of the certified criminal defense specialists and 73% of the indigent defense providers expressing an opinion favored the establishment of an independent forensics laboratory. **Figure 4** reflects the strength of that agreement.

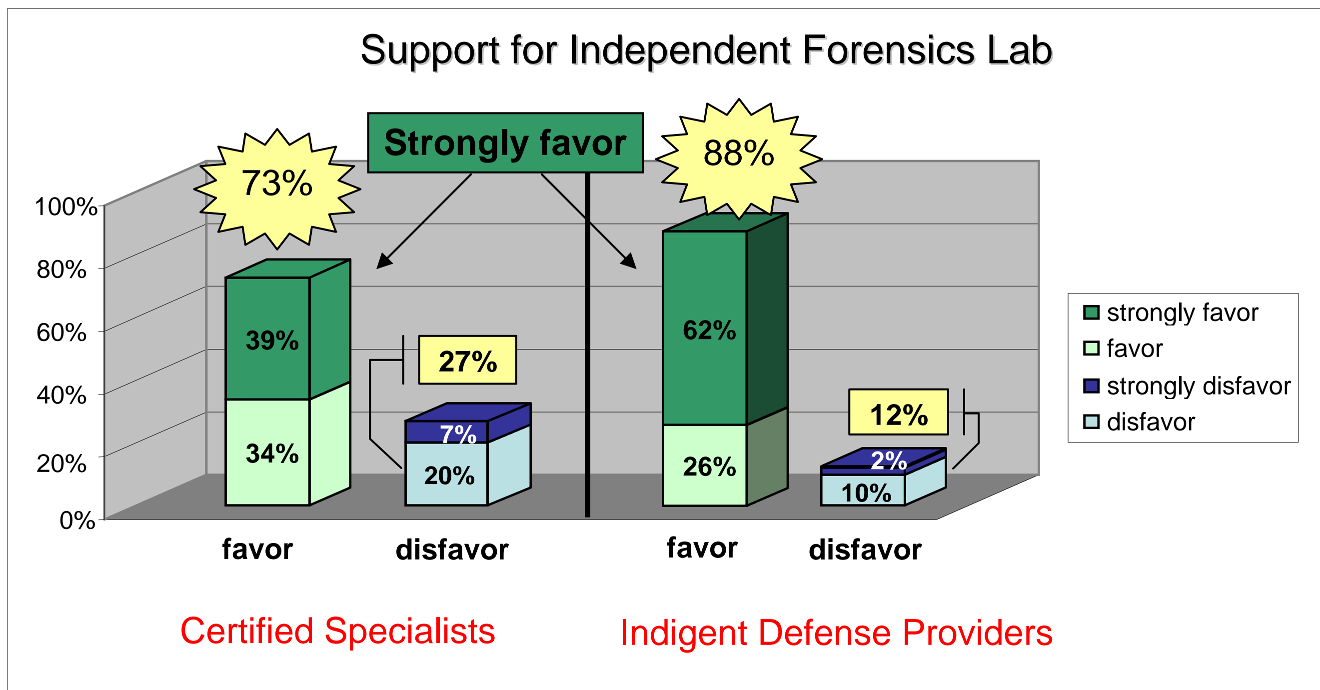

Figure 4.[11]

The question asked of both private and public defense counsel stipulated that the laboratory would be available to both prosecution and defense, but would be operated as an independent agency. A number of defense counsel expressed skepticism regarding whether true independence could be achieved if police and prosecutors would be clients of the laboratory. Therefore, it is recommended that the laboratory serve the defense function exclusively. Presumably even greater agreement would be found among defense counsel for this proposal.

It is envisioned that the laboratory would be operated by a non-governmental agency, possibly attached to a university, and would be governed by an independent board of trustees who would hire the director, set standards for staff, and monitor the operation of the laboratory.

[11] For Certified Specialists: n=101; no preference = 7. For Indigent Defense Providers: n=44; no preference = 9.

Recommendation 1.7 – Pre-Arraignment Representation

Amend Government Code § 27706 to remove any ambiguity about the public defender's duty to provide advice prior to appointment by the court, and thereby clarify the right of the public defender to have immediate access to an accused who remains in custody without counsel.

Commentary:

We documented that most indigent defense providers are not appointed until arraignment. More than one in four does not contact a felony defendant in custody until three or more days after arrest. In some instances the first contact is more than five days after arrest. This systemic problem interferes with the duty to conduct a prompt investigation. In addition, we found confusion regarding the duty of indigent defense providers to provide advice to an indigent arrestee upon request. Some primary providers state in the FAQ section of their web page that they *cannot* provide any representation until appointed. It is therefore recommended that the public defender's duty to provide pre-arraignment representation in Government Code § 27706 be clarified to ensure that indigent defense providers are not denied access to potential clients. It is proposed that the primary indigent defense provider in each county shall be given the resources necessary to screen in-custody felony arrestees on a daily basis and interview any arrestee who, in their opinion, may be indigent to determine the need for advice, representation, and immediate investigation.

2. Recommendations Regarding the Judiciary

Recommendation 2.1 – Judicial Training

Judges should receive training about the danger signs that have led to the conviction of the innocent.

Commentary:

While the great majority (74%) of judges responding to our questionnaire reported that recent training had been offered to judges and/or attorneys in their county in search and seizure, only one-third reported such training was offered on proper eyewitness identification procedures. Yet mistaken eyewitness identification is a leading cause of the conviction of the innocent. Further, only about one-half of the responding judges reported that training was offered regarding forensic evidence collection and testing techniques, or on the relationship between brain disorders, mental illness and retardation to competency and culpability. The lessons learned from the work of Innocence Projects across the country and a review of ineffective assistance of counsel cases should be made available to judges so that they will have a greater appreciation of defense counsel's need for investigative assistance including forensic and other expert assistance.

3. Recommendations for Indigent Defense Contracts

Recommendation 3.1 – Contract Terms to Safeguard Effective Representation
State contracting law should be amended to require, at a minimum, that a contractor providing indigent defense services meets the following standards:

1) Attorneys handling serious/violent felonies shall have at least three years experience handling criminal matters and at least three prior criminal jury trials,
2) Workload standards for attorneys shall not exceed 150 felonies, or 400 misdemeanors annually, and one staff investigator shall be hired for every three attorneys, unless the county has commissioned a workload study by an independent outside agency which justifies different limits based on specific characteristics of that county's criminal justice system,
3) Implementation of a supervisory structure and case management information system for ensuring adequate supervision of staff attorneys and monitoring of contractor's overall performance.

Commentary
These safeguards, based upon national standards, are essential to ensure contractors do not cut corners on the quality of representation provided.

Recommendation 3.2- Prohibition of Flat Fee Contracts
State contracting law should be amended to require that contracts for indigent defense services shall specify the number and cost of attorneys, staff investigators and other support services to be utilized to handle a specific number of cases, and provide that the bid be made on a "cost-plus" basis for a specific pre-determined number of cases.

Commentary
The temptation to use contract systems solely for the purpose of saving money by awarding contracts to the lowest bidder, presents a serious danger to the integrity of our criminal justice system. What should be bid upon is the amount of profit the contractor will receive, not the amount of quality that will be provided. In combination with Recommendation 3.2 above, the requirement that the bid show the proposed cost of providing representation for a pre-determined number of cases ensures that quality will not be sacrificed.

4. Recommendations for Public Defender and Assigned Counsel Systems

Recommendation 4.1- Parity with Prosecution
State law should provide that there shall be substantial parity between the resources allocated to an institutional public defender office or contract defender and the district attorney's office in terms of workload, salaries, technology, legal research, support staff, investigators and access to forensic services and experts.

Commentary
Implementation of this recommendation, which is based upon Principle 8 of the ABA's Ten *Principles of a Public Defense Delivery System*, is essential to reduce the glaring disparity found in a large percentage of counties across the state.

Recommendation 4.2 – Assigned Counsel Compensation
Penal Code § 987.2(a) should be amended to provide that the fee structure for assigned counsel should be determined by a panel of experts appointed by the judiciary, the county board of supervisors, and the local bar association.

> ***Commentary***
> Inadequate compensation for assigned counsel is not only unjust but promotes ineffective assistance of counsel by providing economic incentives which work against the provision of adequate representation.

II. Judicial Decisions on Ineffective Assistance of Counsel (IAC)

It was the hope of the Warren Court that the promise of *Gideon* would be implemented through judicial decisions defining the constitutional right to "effective" assistance of counsel. That expectation, however, has proven to be unrealistic. In part, this is due to the strict two-pronged test established by the Supreme Court in 1984 in *Strickland v Washington.*[12] To establish a violation under that test, the defendant must show not only deficient performance by counsel, but also prejudice.[13] Not surprisingly, less than 10% of all appellate cases over the last ten years that raised the issue of ineffective assistance of counsel (IAC) have been successful.

A. Cases Finding Deficient Performance

We reviewed 658 cases[14] in which the issue of ineffective assistance of counsel was raised. In only 61 cases (9%) was counsel's performance found both deficient and prejudicial. We, therefore, also included for analysis an additional 13 cases where either the trial or appellate court made a finding that counsel's performance was deficient, even though no prejudice resulted. Thus, unprofessional errors were found in only 74 (11%) of all cases reviewed which raised the issue of ineffectiveness.[15] See **Appendix III** for a detailed analysis of these cases, which range from routine felonies to cases imposing life imprisonment under the strikes law. One-half of the cases involved murder or attempted murder. Almost one in four (23%) were cases in which the death penalty had been imposed.

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[12] 466 U.S. 668 (1984).

[13] To establish a constitutional violation a defendant must show that 1) that counsel's performance "fell below an objective standard of reasonableness, and 2) that there is a reasonable probability but for counsel's unprofessional error the outcome would have been different.

[14] Searches were run on January 19, 2007 using Westlaw's CA-CS-All database [CO(CA)& 110K641.13 or 110K641.11 or 110XXX & Strickland & da(last 10 years)]. This retrieved over 900 cases which were culled to find cases actually raising the ineffectiveness issue. A secondary run using LexisNexis was also performed which gathered additional cases. There are also, however, unpublished decisions which do not have any Westlaw headnotes and our research is continuing with regard to locating these additional cases thru a word search formula. This preliminary report therefore does not include all IAC cases.

[15] Over one-half (50.7%) of these "deficient performance" cases were brought by federal habeas corpus. The remaining cases involved direct appeal (32%), state habeas corpus petition (12%), motion for a new trial (4%) or a writ of mandate (1%) n=74. The U.S. Supreme Court subsequently reversed one of the federal habeas decisions on its merits. Two other federal habeas decisions were reversed either by the U.S. Supreme Court or the *en banc* 9th Circuit Court of Appeals, but these decisions were the result of restrictive rules placed upon habeas petitions and did not alter the finding of the original court that there had been a deficient performance.

The most revealing finding from this research, however, was the discovery that over one-half (54%) of these "deficient performance" cases involved the failure to investigate. The majority of these investigative failures involved the failure to present a meritorious defense or the failure to discover critical evidence which impeached a key prosecution witness. Other errors resulted from failing to investigate before rendering advice regarding acceptance of a plea bargain. More than one in four involved the failure to discover mitigating evidence relevant to sentencing in a death penalty case. Many of the death penalty sentencing errors also involved the failure to investigate and raise mental health issues. **Table 1** lists the other categories of deficient performance found in the successful IAC cases.

Table 1.

Deficient Performance Claims	No. of successful claims
Failure to Investigate	**38**
Lack of Knowledge of Law	**21**
Guilty plea advice	**7**
Failure to Call Expert	**3**
Failure to challenge/present forensic evidence	**3**
Failure to file Notice of Appeal	**3**
Lack of Trial Skills	**11**
Failure to suppress inadmissible evidence	**3**
Conflict of Interest	**1**
Other Sentencing error	**5**
Failure to raise mental health issue	**8**
Failure to call witness	**3**
Failure to comply with discovery requirements	**1**
Negligence	**1**
Other	**4**
Total Deficient Performance Claims[1]	**109**

[1]Note: n does not equal 74 (the number of IAC Cases) because some cases contained multiple claims

Over one-quarter (29%) of the deficient performance cases involved counsel's lack of knowledge of the law. One-third of these "error of law" cases involved procedure and about one in five (22%) involved a misunderstanding of criminal law. The greatest number (43%), however, concerned the law of evidence. The evidentiary errors included the failure to object to character evidence, profile evidence, and other prejudicial and irrelevant evidence, and in one case defense counsel inadvertently opened the door to waiver of the marital privilege.

A number of the procedural mistakes, however, were first committed by the prosecutor and acquiesced in by the trial judge. For example, in *People v Holguin*,[16] defendant had waived

[16] 2002 WL 31862857 (unpublished decision).

his right to jury trial on a prior strike allegation, a burglary. On the day set for bench trial on the strike allegation, the prosecutor filed an amended allegation stating a different charge because the original burglary did not qualify as a strike. Defense counsel objected on the ground of timeliness, but failed to precisely state the proper ground.[17] Counsel may have been ineffective, but the error was made in the first instance by the prosecutor and this error was furthermore sanctioned by the trial judge over defense counsel's objection.

The third most frequently found error concerned the lack of trial skills. Almost two-thirds of the cases in this category dealt with the failure to object to improper closing argument by the prosecutor or the failure to conduct an adequate cross examination. The remaining cases involved the failure to adequately prepare defense witnesses and inadequate closing argument by defense counsel. Other "deficiency" cases involved the failure to raise mental health issues, present forensic evidence, call an expert witness, give adequate advice regarding plea offers, suppress inadmissible evidence, and the failure to correct sentencing calculation errors.

We attempted to identify whether the defense attorney in each IAC case was privately retained or an indigent defense provider. We also looked at how many years the attorney had been practicing and whether there had been any bar discipline imposed upon the attorney. Identifying the attorney proved to be quite a time consuming and sometimes impossible task. The court rarely identified the attorney by name, and only occasionally indicated the attorney's status in its opinion. In the cases in which we were able to identify the attorney from docket entries or calls to court clerks, 47% appear to have been privately retained, 36% were public defenders (either county employees or contract defenders) and 16% were assigned counsel. The overwhelming majority were experienced attorneys. The average number of years the attorney had been practicing at the time of the conviction was 16.8 years. Only five attorneys had five or less year's experience, while almost one-third (31%) had over 20 years experience.

In 11 instances the IAC attorney had received some disciplinary action during their career, but these actions were unrelated to the IAC case. Most disciplinary actions involved private reprovals, which are not available to the public unless one makes a request and pays a fee. Four of the IAC attorneys had been suspended at some time during their career, either before or after the IAC case in question. One such privately retained attorney was convicted of criminal contempt in another state, yet two years later handled a death penalty case in Orange County, where he failed to investigate available mitigation evidence of brutal physical and psychological abuse by the defendant's parents. The defendant's parents had retained the attorney, who had nine years experience, on a $25,000 fee. However, the attorney had allegedly received only $5,000 at the time of the trial and the father was doing odd jobs for him to pay off the fee, thus presenting a rather clear conflict of interest that perhaps explains the failure to investigate the parental abuse. This attorney was subsequently suspended, but this was nine years later based on eight different complaints for misrepresentation and failure to perform services competently. The attorney resigned with charges pending, but was reinstated in 2001 and is still practicing today. Only one attorney was actually disbarred, but this was seven years later and unrelated to the IAC case in which the court called the retained counsel's performance "egregious" for pursuing a nonviable entrapment defense and calling his client a liar during

[17] Defendant was entitled to have the same jury that convicted him decide all strike allegations. *People v Tindall*, 24 Cal 4th 767 (2000). Because counsel proceeded with the bench trial after his timeliness objection was overruled, the appellate court held that he waived the defendant's jury trial right, and then found counsel ineffective.

closing argument. Such extreme examples of truly bad apples are few. What is remarkable is that they are allowed to remain on the tree for so long.

We also analyzed the remaining 584 cases in which IAC was raised as an issue, but no finding of deficient performance was made. These cases raised 613 claims of ineffectiveness. One-third of these claims alleged that counsel failed to present an effective defense, including the failure to investigate, call a particular witness, or present specific evidence. About one in four concerned the failure to object to the prosecutor's closing argument or testimony of prosecution witnesses. Other complaints included the failure to request or object to jury instructions (14%), the failure to suppress evidence (12%), the failure to conduct adequate cross-examination (7%) and the failure to raise competency, insanity or other mental health issues (6%).

The court made a finding that counsel's performance was not deficient in 434 (71%) of these claims. However, 152 claims (25%) were decided without "grading" counsel's performance because the court resolved the case on the ground that even if there had been error, no prejudice resulted. The remaining 27 claims (4%) were procedurally defaulted and thus, the merits were not addressed by the court.

B. Data from Judges and Certified Specialists

We asked both judges and certified criminal defense specialists[18] to report if they had observed in their county, an error or deficient performance by defense counsel which they believed fell below the standard of reasonably competent representation. Almost two-thirds (63%) of the judges and over three-fourths (76%) of the specialists stated that they had observed such a deficient performance during the past 12 months. When asked to identify whether the deficient performance was by either retained or an indigent defense provider, the overwhelming majority of both judges and specialists reported that they have observed deficient performances by both. Almost one-third (30%) of the judges and almost one-half (49%) of the specialists indicated that they observed errors involved the failure to investigate. Indeed, over one-half (56%) of the specialists indicated that there was a significant need to train defense counsel in their county on how to effectively use investigators. **Table 2** reflects the frequency of specific errors observed.

Table 2.
Deficiencies Observed by Judges and Criminal Defense Specialists

Type of Deficiency Observed	Judges	Specialists
Failure to Investigate	30%	49%
Lack of Trial Skills	48%	32%
Lack of Knowledge of Law	44%	52%
Lack of Experience	65%	39%
Conflict of Interest	1%	16%
Failure to Prepare	48%	55%
Negligence	1%	16%

[18] The standards for certification by the State Bar of California as a criminal defense specialist are set out in footnote 9.

We also asked the criminal defense specialists to make an assessment of the training needs in their county. They reported having a significant training need in the following areas:

a. immigration consequences of guilty pleas
b. brain disorders, mental illness and retardation
c. death penalty mitigation
d. challenging eyewitness identification
e. presenting/challenging expert testimony
f. understanding forensic evidence

In addition, we asked judges whether training on several of these topics was available for either judges or defense counsel. Only 15 judges reported having training available in their county within the last three years on understanding mental health issues or forensic evidence. Only 9 judges reported recent training on proper eyewitness identification procedures.

III. Resources for Indigent Defense

We obtained statistical data from the Judicial Council of California[19] and budgets for indigent defense and prosecution from 51 (88%) of the 58 counties.[20] The combined total of felony and misdemeanor filings ranged widely from a low of 94 in Alpine county, having a population of 1,241 to a high of 216,677 in Los Angeles, having a population of over 10 million. The resources allocated to indigent defense systems likewise vary dramatically across the state. Sutter County, with a population of 91,450 spends only $5.85 per capita on indigent defense, while Alpine, given its tiny population spends $44.32 per capita.[21] The strain on small rural counties like Alpine is seen from the fact that all counties having less than 15,000 residents have high per capita expenditures that are more than twice the statewide average of $16.63.

Even within the same population class, however, there are marked disparities. Butte County, with a population of 217,209, spends only $9.94 per capita on indigent defense, while Yolo County, with a population of 190,344, spends more than three times as much at $30.72 per capita. Even so, there is still a glaring disparity between resources allocated to indigent defense and prosecution in Yolo County. This disparity is especially troubling when death penalty cases are involved.

The Yolo County Public Defender and District Attorney handled one death penalty case last year. However, as **Table 3** below shows, the Public Defender office did so with just under

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19 Court statistics were obtained from the Judicial Council's 2006 Court Statistics Report entitled Statewide Caseload Trends, covering the fiscal year 2004 - 2005.

20 Seven (7) counties (Del Norte, Inyo, Madera, Mariposa, Modoc, Tehama, and Tuolumne) did not have budgets available online and repeated efforts to receive a manual copy of the budget were unavailing. Prosecution and Indigent Defense budget information was retrieved from a county's Adopted Budget for the most recent year (2006-07). If the Adopted Budget was unavailable for the most recent year, the county's Recommended Budget was used. In the event that both the Adopted and Recommended Budget for the most recent year was missing, the county's Actual Budget from the preceding year was used (usually 2005-06). Forty (40) budgets were from the 2006-07 recording year; Eight (8) budgets (16%) were from 2005-06 and three (3) budgets (6 %) were from the 2004-05 recording year.

21 The per capita budgets for prosecution also ranged widely from $7.61 per person in Kings County to $175.23 per person in Alpine County.

one-half of the resources that were allocated to the prosecution. Viewed from the standpoint of resources per attorney, the prosecutor had the advantage of over $100,000 more per staff attorney than the public defender office.[22] This county was also reported as having a significant problems with lack of prompt discovery and the withholding of Brady evidence by the prosecution.

Table 3. Yolo County Resource Comparison

Yolo County	Total Budget	# of attorneys	Resources per attorney
Public Defender	$5,847,368	24	$243,640
District Attorney	$11,444,209	33	$346,794

The disparity in funding between prosecution and defense is seen statewide. The total amount allocated annually to indigent defense by county governments is $726,773,196, while the amount spent on prosecution totaled $1,218, 481,004. Statewide, the statistical mean (average) Indigent Defense Budget was $14,250,455, while the statistical mean (average) Prosecutorial Budget was $23,891,784. Thus prosecution budgets, on average, were more than 40% larger than indigent defense budgets. Yet according to judges responding to our survey the great bulk of criminal defendants (frequently 95% or more) are unable to afford private counsel and thus must be represented by the indigent defense system.

Even after reducing the prosecution's budget so that only that portion attributable to prosecuting indigent defendants is compared, there is rarely any semblance of parity. **Table 4**, on the following page, compares the weighted per capita expenditure for prosecution, to the expenditure for indigent defense and shows the disparity for each county, by population size.

Table 4 was prepared by obtaining county budget data for the indigent system as a whole and comparing that with the amount spent by the county on prosecution. The prosecutor's budget was weighted[23] to subtract the portion attributable to cases handled by privately retained counsel.

This comparison does not take into account the fact that public defender's actually handle more misdemeanor cases than most district attorney offices because the various city attorneys in a county normally handle the misdemeanors falling within their jurisdiction. This comparison also does not take into account the many functions which public defenders serve outside the criminal justice area, such as civil contempts, mental heath commitments, and probate conservatorships. It also does not take into account the fact that the indigent defense system must provide multiple counsel for co-defendants, where the prosecution can be handled by a single attorney.

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[22] This comparison actually overstated the resources per public defender staff attorney because not all of the indigent defense budget goes to the public defender office. It also ignores the additional manpower resources available to the prosecution from the city police, the county sheriff's department and the state highway patrol.

[23]This was done by using data obtained from judges through our judicial questionnaire to ascertain the proportion of indigent cases. Judges were asked to estimate the proportion of felony cases that were handled by the indigent defense system. The proportion of indigent cases ranged from 75% to 95% or more, with the most frequent responses being "90%" and "95% or more." The median was 90% and the grouped median 88%. We used the lower grouped median. The prosecutor's budget was then multiplied by this percentage to reduce it so that the amount used for comparison more closely reflected the amount attributable to indigent cases. This method actually understates the prosecutor's budget in many cases, however, because it does not take into account the numerous sources of grant funds prosecutors receive for specifically targeted projects.

Table 4. Per Capita Disparities between Defense and Prosecution Budgets by Population Class

Population Class	County	Per Capita Defense Budget	Per Capita Prosecution budget (actual)	Per Capita Prosecution Budget (weighted)	Disparity between Prosecution and Defense Budgets per capita	Type of Primary Defense Provider
10 million+	Average for Pop. Class	$19.19	$28.76	$25.31	$6.12	
	Los Angeles	$19.19	$28.76	$25.31	$6.12	Public Defender
2 million+ to 10 million	Average for Pop. Class	$21.37	$34.11	$30.02	$8.65	
	Orange	$21.25	$29.44	$25.91	$4.66	Public Defender
	San Diego	$21.48	$38.78	$34.13	$12.65	Public Defender
1 million+ to 2 million	Average for Pop. Class	$19.76	$34.17	$30.07	$10.31	
	Alameda	$26.21	$35.29	$31.06	$4.85	Public Defender
	Contra Costa	$19.45	$26.55	$23.36	$3.91	Public Defender
	Riverside	$21.17	$43.14	$37.96	$16.79	Public Defender
	Sacramento	$16.42	$27.18	$23.92	$7.50	Public Defender
	San Bernardino	$13.69	$31.10	$27.37	$13.68	Public Defender
	Santa Clara	$21.63	$41.78	$36.77	$15.14	Public Defender
500,000 to 1 million	Average for Pop. Class	$19.81	$31.95	$28.11	$8.31	
	Fresno	$13.91	$24.38	$21.45	$7.54	Public Defender
	Kern	$20.24	$28.97	$25.49	$5.25	Public Defender
	San Francisco	$27.94	$47.04	$41.40	$13.46	Public Defender
	San Joaquin	$22.43	$26.58	$23.39	$0.96	Public Defender
	San Mateo	$20.20	$28.60	$25.17	$4.97	Assigned Counsel Program
	Stansilaus	$15.60	$25.37	$22.33	$6.73	Public Defender
	Ventura	$18.32	$42.69	$37.57	$19.25	Public Defender
250,000+ to 500,000	Average for Pop. Class	$20.79	$39.22	$34.51	$13.73	
	Marin	$22.15	$55.84	$49.14	$26.99	Public Defender
	Monterey	$12.82	$31.47	$27.69	$14.87	Public Defender
	Placer	$32.49	$50.91	$44.80	$12.31	Contract Defender
	San Luis Obispo	$16.44	$39.84	$35.06	$18.62	Contract Defender
	Santa Barbara	$19.47	$34.40	$30.27	$10.80	Public Defender
	Santa Cruz	$27.91	$39.52	$34.78	$6.87	Contract Defender
	Solano	$21.78	$44.00	$38.72	$16.94	Public Defender
	Sonoma	$16.21	$22.25	$19.58	$3.37	Public Defender
	Tulare	$17.81	$34.74	$30.57	$12.76	Public Defender
100,000+ to 250,000	Average for Pop. Class	$18.54	$35.27	$31.04	$12.50	
	Butte	$9.94	$39.61	$34.86	$24.92	Contract Defender
	El Dorado	$15.61	$39.50	$34.76	$19.15	Public Defender
	Humboldt	$21.87	$31.33	$27.57	$5.70	Public Defender
	Imperial	$12.68	$23.76	$20.91	$8.23	Public Defender
	Kings	$6.09	$7.61	$6.70	$0.61	Contract Defender
	Merced	$18.32	$30.84	$27.14	$8.82	Public Defender
	Napa	$27.65	$52.36	$46.08	$18.43	Public Defender
	Nevada	$17.99	$32.61	$28.70	$10.71	Public Defender
	Shasta	$24.51	$34.99	$30.79	$6.28	Public Defender
	Yolo	$30.72	$60.12	$52.91	$22.19	Public Defender
50,000 to 100,000	Average for Pop. Class	$14.42	$29.22	$25.71	$11.29	
	Lake	$15.44	$31.49	$27.71	$12.27	Contract Defender
	Mendocino	$24.93	$39.94	$35.15	$10.22	Public Defender
	San Benito	$11.13	$18.01	$15.85	$4.72	Contract Defender
	Sutter	$5.85	$31.74	$27.93	$22.08	Contract Defender
	Yuba	$14.76	$24.92	$21.93	$7.17	Contract Defender
15,000 to 50,000	Average for Pop. Class	$13.53	$40.67	$35.79	$22.25	
	Amador	$14.74	$82.67	$72.75	$58.01	Contract Defender
	Calaveras	$9.48	$29.55	$26.00	$16.52	Contract Defender
	Colusa	$13.28	$30.52	$26.86	$13.58	Contract Defender
	Glenn	$11.89	$34.21	$30.10	$18.21	Contract Defender
	Lassen	$14.65	$17.45	$15.36	$0.71	Public Defender
	Plumas	$16.48	$42.50	$37.40	$20.92	Contract Defender
	Siskiyou	$14.20	$47.76	$42.03	$27.83	Public Defender
0 to 15,000	Average for Pop. Class	$35.50	$109.70	$96.53	$61.03	
	Alpine	$44.32	$175.23	$154.20	$109.88	Contract Defender
	Mono	$35.67	$121.07	$106.54	$70.87	Contract Defender
	Sierra	$26.19	$68.04	$59.88	$33.69	Contract Defender
	Trinity	$35.83	$74.45	$65.52	$29.69	Contract Defender

Population Class	Average per capita Disparity between Prosecution and Defense Budgets
10 million+	$6.12
2 million+ to 10 million	$8.65
1 million+ to 2 million	$10.31
500,000 to 1 million	$8.31
250,000+ to 500,000	$13.73
100,000+ to 250,000	$12.50
50,000 to 100,000	$11.29
15,000 to 50,000	$22.25
0 to 15,000	$61.03

Table 4a.
Average Disparity for each Population Class

The statewide average expenditure for indigent defense is $19.62 per capita, compared to a statewide average of $36.25 per capita spent on prosecution. Thus, statewide $16.63 more per capita is spent on prosecution than defense, placing California in non-compliance with Principle Eight of the ABA's *Ten Principles of A Public Defense Delivery System*, which requires parity between the resources allocated to indigent defense and the prosecution.[24] The Commentary to Principle 8 states: "There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense."[25]

As the graph in **Figure 5** reflects, the per capita disparity rises steeply in the most rural counties. This is not due simply because the expenditures per capita are large, but rather because the disparity in dollars is large. For example, Los Angeles County's indigent defender budget is $196,788,000 compared to the prosecution's weighted budget ($294,647,000 x 88%) of $259,289,360. Thus the disparity is $62,501,360 making the prosecution's budget 1.3 times greater than the indigent defense budget. By contrast Alpine county spends only $55,000 on indigent defense and $191,365 (weighted) on prosecution. Thus Alpine spends almost 3.5 times as much on prosecution as defense. Similarly Mono County with a population of 13,597, also falls into the lowest population class. While it spends $35.67 per capita on indigent defense, the weighted expenditure for prosecution is $106.54 for a staggering disparity of $70.87 per capita.

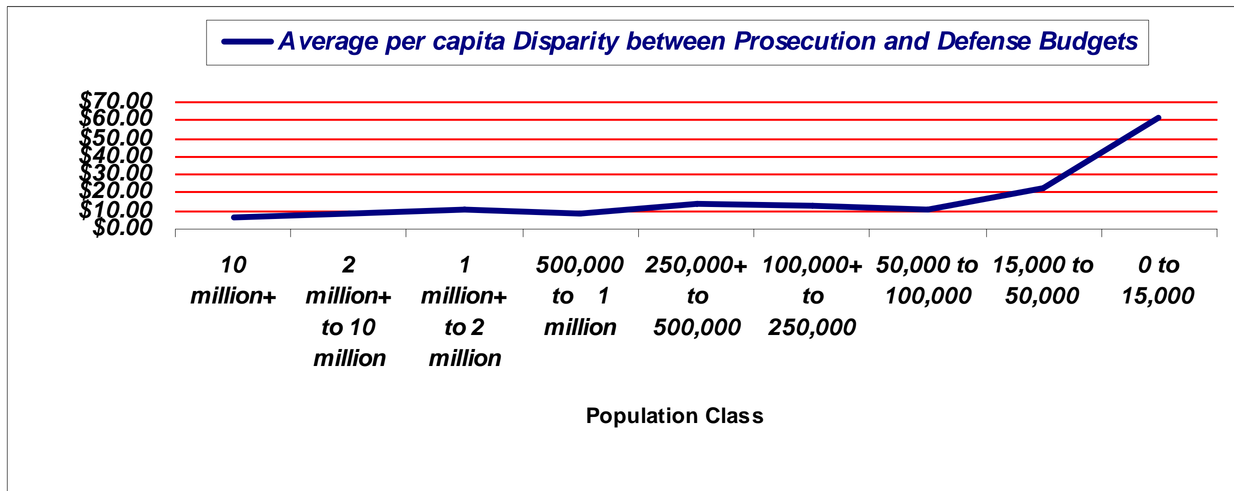

Figure 5.

[24] *Ten Principles of a Public Defense Delivery System*, American Bar Association (2002), hereafter referred to as the "ABA Ten Principles."

[25] Id.

There are also wide differences in the amount of the budget disparity between comparable counties. For example, as shown in **Table 5**, El Dorado and Humboldt counties have comparable populations and comparable felony and misdemeanor caseloads. Yet El Dorado spends almost two and half million dollars more on prosecution - a disparity of $13.87 per capita.

Table 5. Comparison of El Dorado and Humboldt Counties

County	Population	Total Caseload	# felony cases	Defense Budget	Prosecution Budget[26]	Per Capita Disparity
El Dorado	133,000	4,342	1,248	$2,750,135	$6,124,876	$19.57
Humboldt	176,000	3,701	1,415	$2,898,913	$3,653,252	$5.70

Table 6 below reports the average per capita expenditures and disparities by type of provider. While the type of provider appears to make little difference in the amount spent per capita on indigent defense, the disparity between indigent defense and prosecution is largest in counties having contract defenders.

Table 6. Per Capita Disparity by Type of Provider

	Average Per Capita Defense Budget	Average Per Capita Prosecution budget (actual)	Average Per Capita Prosecution Budget (weighted)	Average Disparity between Prosecution and Defense Budgets
Public Defender	$19.76	$35.33	$31.09	$11.33
Contract Defender	$19.33	$52.33	$46.05	$26.72
Assigned Counsel Program	$20.20	$28.60	$25.17	$4.97
Statewide Average	$19.62	$41.19	$36.25	$16.63

[26] Weighted budget. See footnote 23.

IV. Data from Public Defender Offices

Just over one-half (57%) of California's 58 counties have created an institutional public defender office[27] as a county department to serve as the primary provider of criminal defense services to the indigent accused. Public defender offices in 28 (85%) of these 33 counties responded to our questionnaire.[28] All of these offices represented felony and misdemeanor clients and the majority (94%) also provided representation in juvenile and mental commitment cases. Over half (55%) handled additional matters such as civil contempt, probate conservatorship, child support and civil sexually violent predator commitments. The majority (94%) were primary providers.

A. Excessive Workloads

1. Staff Attorneys

The California State Bar's *Guidelines on Indigent Defense Services Delivery Systems* (2006) provides:

> Indigent defense providers shall not accept nor be burdened with excessive workloads that compromise the ability of the provider to render competent and quality representation in a timely manner, without the risk of damaging the mental/physical health and motivation of the providers.

The *ABA Standards for Criminal Justice: Providing Defense Services*, 4-1.3 (e) states:

> Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations.[29]

The ABA's *Ten Principles of a Public Defense Delivery System* further provides:

> National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.[30]

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[27] We have defined "public defender office" as a county department where the attorneys employed are salaried public employees. This type of office should not be confused with "contact defenders" who are also sometimes called public defenders. A contract defender is a solo practitioner or a law firm who acts as an independent contractor when negotiating with the county to handle indigent criminal cases.

[28] We are grateful to the California Public Defender's Association for compiling a list of all known public defender, contract defender and assigned counsel systems which we updated. There are often several public defender offices in a single county because of the need to deal with conflicts of interest arising from representation of co-defendants. For example San Diego has three separate offices (The Department of Public Defender, The Department of Alternative Public Defender, and the Department of Multiple Conflicts Counsel). Forty-five questionnaires were thus sent out to public defender offices in 32 counties and 31 (69%) of the offices responded. One office also partially responded to a telephone follow up making N=32 for some questions.

[29] *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 4-1.3 (e), hereafter referred to as the "ABA Standards for Criminal Justice."

[30] Principle 5, *Ten Principles of a Public Defense Delivery System*, American Bar Association (2002), hereafter referred to as the "ABA Ten Principles."

Few of the counties using institutional public defender offices comply with these standards. All public defender offices save one reported having a problem with excessive attorney workloads. Defenders were asked to rank the significance of this problem on a five-point scale.[31] Over 81% stated that excessive attorney workloads were a significant, very significant or serious problem. See **Figure 6** below.

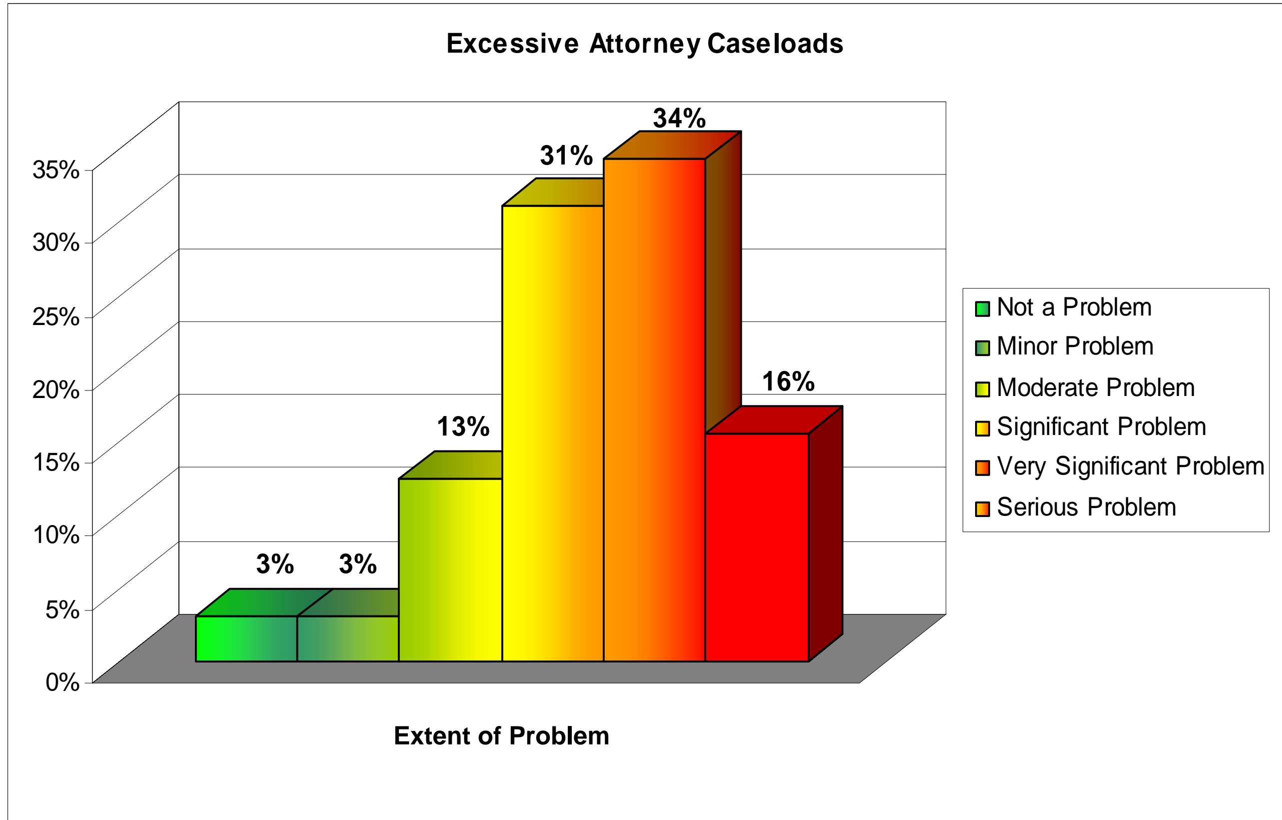

Figure 6. Public Defender Offices

This finding was independently confirmed by certified criminal defense specialists who were also asked to assess the health of public defender offices in the county in which they practice. Almost three-fourths (73%) of those responding from public defender counties indicated that excessive attorney caseloads were a significant problem. More than one in four (28%) ranked it as a "serious" problem.

Sixty-one percent of the public defender offices reported having felony caseloads that exceeded the standard of 150 non-capital felonies per year established by the National Advisory Commission on Criminal Justice Standards and Goals[32] and adopted by the ABA in its Ten Principles. Seventy-five percent of the public defender offices exceeded the NAC Standard of 400 non-traffic misdemeanors per attorney per year.

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[31] The five-point scale used to measure significance was: 0=not a problem, 1=minor problem, 2=moderate problem, 3=significant problem, 4=very significant problem, 5=serious problem.

[32] National Advisory Commission on Criminal Justice Standards and Goals, COURTS, Standard 13.12 (1973) hereafter referred to as the "NAC Standards."

As the National Study Commission on Defense Services observed in 1976, these national standards should serve only as a starting point in the analysis, because only an actual workload study can determine the maximum number of cases an attorney can effectively handle in a given jurisdiction. The National Center for State Courts, for example, did a workload assessment for the Maryland Public Defender Office in 2005, which recommended substantially lower caseloads than the national standards.[33]

Operating under excessive caseloads, of course, has a ripple effect. It not only makes ineffective assistance more likely, it also leads to burnout. Turnover of experienced staff was a problem in over 61% of the public defender offices. Almost three out of four offices in which excessive caseloads were a significant problem, also reported a significant problem with turnover. Inadequate compensation may also be a contributing factor to turnover. Over one-third (39%) of the public defender offices reported disparity in salary and benefits when compared to the District Attorney's office.

2. Investigators

One hundred percent (100%) of the public defender offices also reported that excessive investigator workloads were a problem. Seventy-seven percent (77%) reported that this was a significant, very significant or a serious problem. The average ratio was one investigator for every 4.6 attorneys, which exceeds the national standard of one investigator for every three attorneys.[34] The ratio of investigators to attorneys also varied widely. In two counties there was only one investigator for every 8 attorneys. One of these offices handled 10 death penalty cases, while the other handled none. Two offices had no staff investigator and one of these reported that there was a "very significant problem" in obtaining court approval for investigative assistance. Investigation may also be hindered by the fact that one-half (58%) of the offices reported that the lack of interpreters was a problem.

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[33] Maryland Attorney and Staff Workload Assessment, 2005. The recommendations in the table below were based upon a time study, focus group discussions and surveys of attorneys.

Maryland: Recommended Annual Attorney Caseloads Based on Final Case Weights

Cases per Attorney	Rural	Suburban	Urban
Capital (Death Notice Not Filed)	3	3	3
Capital (Death Notice Filed)	1	1	1
Violent Felony	57	52	50
Non-Violent Felony	100	79	118
Homicide	12	12	15
Misdemeanor Jury Trial Demands/Appeals	351	463	320

The Maryland study highlights that there are differences in the workload urban and rural offices can handle. Curiously, our study also found that there appeared to be a relationship between California defender's own views of how many cases one attorney could effectively handle and the population of their county. When asked for their view, 23 of the public defenders answered this question. One-half of this group of respondents believed that felony and misdemeanor caseloads should be at or below the national standards. The majority of those respondents who believed the felony and misdemeanor caseloads could exceed the national standards were from counties with populations of 500,000 or less. The median for non-capital felonies was 170. The median for non-traffic misdemeanors was 450.

[34] NAC Standards, supra, n. 32.

Most revealing, however, was the fact that 100% of the offices reported that the inability to interview prosecution witnesses was a problem. More than one-quarter (29%) of the offices reported that this presented a "serious problem." This problem is compounded by three additional factors. First, most defender offices are not contacting defendants until several days after arrest, so prompt investigation is impossible. Second, it was reported by both defenders and certified criminal defense specialists that prosecutors in most counties delay in turning over requested discovery and fail to provide *Brady* evidence to defense counsel. Third, and perhaps most important, many cases are being disposed of at a readiness/disposition conference with the district attorney and the trial judge, soon after arraignment, where in some counties a "take it or leave it" offer is often presented by the prosecution before the defense has had time to conduct a complete investigation.

B. Time of First Contact

The ABA Standards for Criminal Justice state:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel…[35]

The ABA's Ten Principles also require appointment of counsel "as soon as feasible" and in the commentary to the Third Principle state: "Counsel should be furnished upon arrest, detention or request and usually within 24 hours."[36]

The State Bar of California Guidelines on Indigent Defense Services Delivery Systems (2006) also observe in the "Standards of Representation" section that indigent defense providers have the responsibility to conduct "an in-depth factual inquiry: in a "timely manner."[37] Only one public defender office reported that it establishes contact with an indigent accused prior to arraignment.[38] The majority of offices are appointed at the initial arraignment on a felony charge and make first contact with an in-custody defendant at that time.[39] Eight offices indicated that they were not appointed until after arraignment. When public defenders made first contact with their clients varied widely, as shown in **Figure 7.** Only one office reported that contact was made with an in-custody felony defendant within 24 hour after arrest. Less than one-half (45%) made first contact between 1-2 days after arrest. Eight offices made first contact between 3-5 days and three offices did not make contact until more than 5 days after arrest.

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[35] ABA Standards for Criminal Justice, Standard 4-4.1, surpa n. 25.
[36] Commentary to Principle 3, *ABA Ten Principles,* supra n. 26.
[37] State Bar of California *Guidelines on Indigent Defense Services Delivery Systems* (2006) at 11, hereafter "State Bar Standards."
[38] The San Diego Public Defender office in a joint venture with California Western School of Law and the University of San Diego has established a Pre-Arraignment Services Program in which law students interview recent arrestees at the Central Jail and Los Colinas Women's Detention Center. In appropriate cases students verify information necessary for accurate bail determinations and subsequently represent those clients at their arraignment, arguing for OR release or reduced bail.
[39] This was also true with respect to misdemeanors, although a higher number (42%) of the offices were not appointed until after arraignment.

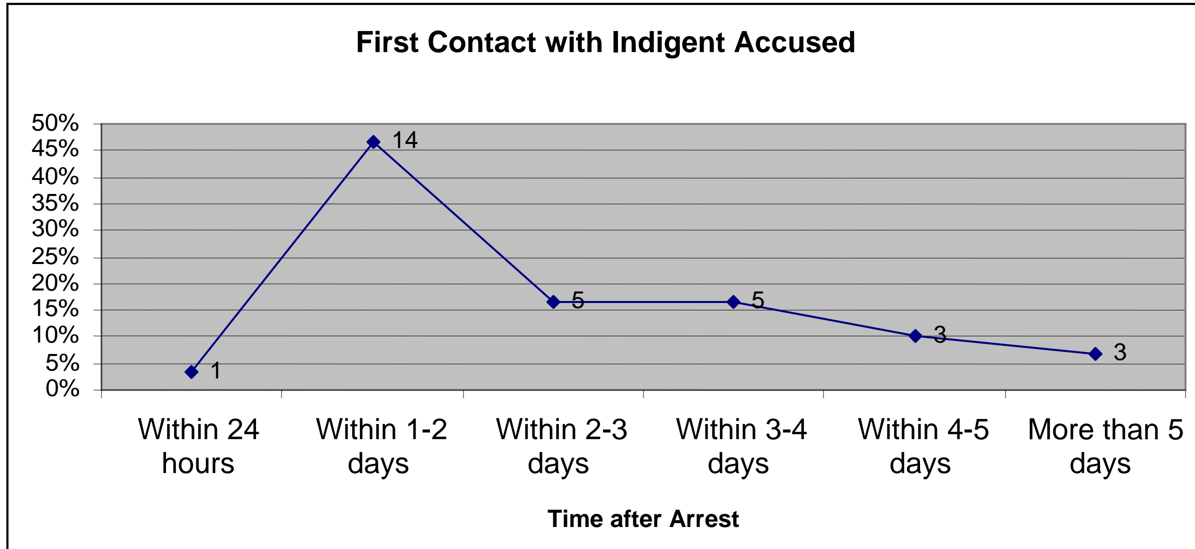

Figure 7. Number of Days After Arrest Before First Contact with Indigent Client

The National Study Commission's *Guidelines for Legal Defense Systems*, Standard 1.2 (Time of Entry) provides:

> Effective representation should be available for every eligible person as soon as:
> (a) The person is arrested or detained, or
> (b) The person reasonably believes that a process will commence which might result in a loss of liberty or the imposition of a legal disability of a criminal or punitive nature, whichever occurs earliest.

Standard 1.3 (Procedures for Providing Early Representation: Program Responsibilities) further provides:

> In order to ensure early representation for all eligible persons, the defender office or assigned counsel program should:
> (a) Respond to all inquiries made by, or on behalf of, any eligible person whether or not that individual is in the custody of law enforcement officials;
> (b) Establish the capability to provide emergency representation on a 24-hour basis; Implement systematic procedures, including daily checks of detention facilities, to ensure that prompt representation is available to all persons eligible for services;
> (c) Provide adequate facilities for interviewing prospective clients who have not been arrested or who are free on pre-trial release;
> (d) Prepare, distribute and make available by posting in a conspicuous place in all police stations, courthouses and detention facilities a brochure that describes in simple, cogent language or languages the rights of any person who may require the services of the defender or assigned counsel and the nature and availability of such services, including the telephone number and address of the local defender office or assigned counsel program; and
> (e) Publicize its services in the media.

> Upon initial contact with a prospective client, the defender or assigned counsel should offer specific advice as to all relevant constitutional or statutory rights, elicit matters of defense, and direct investigators to commence fact investigations, collect information relative to pre-trial release, and make a preliminary determination of eligibility for publicly provided defense services.
> Where the defender or assigned counsel interviews a prospective client and it is determined that said person is ineligible for publicly provided representation, the attorney should decline the case and, in accordance with appropriate procedure, assist the person in obtaining private counsel. However, should immediate service be necessary to protect that person's interest, such service should be rendered until the person has had the opportunity to retain private counsel.

The California State Bar Standards also emphasize that institutional public defenders are to provide "comprehensive services' and declare that there "should exist no gap in the services spectrum."[40] Citing California Government Code § 27706, the State Bar Standards observe that the "institutional defender need not wait until court appointment to commence representation of a client."[41] Government Code § 27706 provides:

> The public defender shall perform the following duties:
> (a) Upon request of the defendant or upon order of the court, the public defender shall defend, ….any person who is not financially able to employ counsel and who is charged with the commission of any contempt or offense triable in the superior courts at all stages of the proceedings, including the preliminary examination. The public defender shall, upon request, give counsel and advice to such person about any charge against the person upon which the public defender is conducting the defense….

Many public defender offices have heeded the spirit of the State Bar Standards and provide representation even before arrest.[42] However, other defenders state in their web page

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[40] Id.
[41] Id. at 8.
[42] See for example the Web site of the San Bernardino Public Defender Office, which states in its FAQ: "**WHAT SHOULD I DO IF I BELIEVE I AM UNDER LAW ENFORCEMENT INVESTIGATION IN SAN BERNARDINO?** If you have reason to believe you are under investigation by San Bernardino law enforcement, you should contact the San Bernardino County Public Defender either by telephone at 909-383-2400 or by email through the Department's internet website at [hyperlink]. Consultation with an attorney is important so that you can understand your rights, responsibilities and the potential outcomes of any law enforcement investigation. Most law enforcement investigators will understand and must respect your desire to first speak with an attorney. Any consultation about your own potential case with the San Bernardino County Public Defender will be completely confidential. This Department will accept collect calls regarding San Bernardino County criminal or civil commitment legal matters." See also the Santa Barbara Public Defender office web page which states in its FAQ: "**When and how does one apply for the services of the public defender?** The services of the office are available seven days a week, 24 hours a day for emergency needs. Attorneys are on call during non-office hours and may be reached at in the north county at (805) 705-9092 and in the south county at (805) 705-9093. Any indigent person who is about to be arrested, charged with a misdemeanor or more serious crime may request our assistance. All law enforcement agencies in the county are regularly mailed a list of on call attorneys and reminded that we are available

FAQs that they cannot provide representation until appointed by the court. [43] While Government Code § 27706 appears to impose a mandatory duty upon the public defender to provide advise about a criminal charge upon request, that section is ambiguously drafted because the words "defend…at all stages" can be narrowly construed to include only critical stages of a criminal proceeding.[44] The duty to advise, moreover, only applies to a charge "upon which the public defender is *conducting the defense*" which also implies there has been an appointment. Therefore, it is recommended that this section be amended to clarify the duty of the primary indigent defense provider in each county to furnish advice prior to formal appointment. Early representation is essential to obtaining pre-trial release and can be critical in cases requiring immediate investigation. The statute should provide for the primary indigent defense provider in each county to screen recent felony arrestees on a daily basis and contact any arrestee remaining in custody who in their opinion may be indigent. It should be noted, however, that defenders cannot be expected to do this without additional resources.

There is also an additional reason to ensure prompt representation is provided to the indigent accused. Public defender offices in 14 of the 32 public defender counties, reported that they frequently determine the disposition of a felony case at a disposition conference with the district attorney and judge held prior to the time set for the preliminary hearing. Given the fact that most defenders are not appointed until arraignment, however, there is little time to conduct an investigation.[45]

C. Reinstatement of the Traditional Preliminary Hearing

Given limited investigative resources, public defender offices do not routinely interview witnesses before the preliminary hearing, which must be held within 10 days after arraignment for a felony defendant in custody. When defenders were asked how often investigators

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to respond to requests for services (such as when a suspect seeks the advice of an attorney prior to interrogation) quickly. By law these numbers are to be posted in any place of detention so that a person being arrested may contact us at that time."

[43] See, for example, a coastal Public Defender Office's web page, which publishes the following FAQ:
"Can I drop by the Public Defender's Office for legal advice if the court hasn't appointed me?
No. Our office welcomes the public to drop by however; the Public Defender is only allowed to represent clients that the court has appointed. If you need general information our office may be able to assist." It should be noted that this office reported that serious excessive attorney and investigator workloads, had no paralegal staff and had handled a death penalty case while laboring under caseloads that exceed national standards. Asking such an office to provide additional services will require additional resources.

[44] It is not our position that this is a correct interpretation, only that it is a possible one. The right to counsel at a post charge line-up and the right to consult an attorney before submitting to custodial interrogation are of course well established, but an accused can waive those rights without such consultation if they do not think counsel is readily available. Early representation is also needed to assist in obtaining pre-trial release and of course to commence an immediate investigation

[45] Since a staff attorney has to be assigned to the case before an in-depth interview with the defendant normally takes place, the window for investigation can be quite small. See, for example, one public defender's web page FAQ: **When do I meet my Public Defender?** There will be a Public Defender in court at your first appearance. Often that attorney will not be your permanent Public Defender. It takes a few days for your case to be assigned to your personal Public Defender.

interviewed victims and/or eyewitnesses before the preliminary hearing, over one-half (55%) stated this was done only occasionally. Four offices responded that such interviews were rarely done. Less than one-third (32%) of the offices stated that key witnesses were often or very often interviewed.[46]

Prior to Prop 115, defense counsel had the opportunity to cross examine such key witnesses at the preliminary hearing and was thus able to make an informed assessment of the merits of the case. Prop 115, however, took away the right to confront witnesses at the preliminary hearing. The statements of witnesses, untested by cross-examination, can simply be presented by a police officer. Thus, the defense is deprived of any meaningful opportunity to test the strength of the state's case at this stage.

The loss of the check and balance provided by the traditional preliminary hearing is a serious problem where defense counsel lacks the investigative resources necessary to conduct the "careful factual inquiry" required by national and State Bar standards. This problem is compounded further where the prosecution delays in turning over discovery and withholds *Brady* evidence. Without adequate resources, defender office investigators are forced to play "catch up," interviewing witnesses shortly before trial when memories may have faded, or worse, may have been contaminated by media and other influences. By contrast, if the traditional preliminary hearing is reinstated, this will give the defense an opportunity to meaningfully test the merits of the prosecution's case before making a decision regarding disposition. At the same time it will cause the prosecution to focus on its discovery obligations which will have the additional benefit of result in weeding out charges that cannot be sustained. Because all defense counsel have reported difficulty in interviewing prosecution witnesses, the use of depositions should also be considered. This would give defense counsel an effective option where witnesses have been told not to talk to defense counsel, or where the prosecution has failed to call key witnesses at the preliminary hearing.

D. DNA and other Forensic Testing

Almost one-half (48%) of the public defenders had experienced difficulty obtaining DNA testing. An almost equal number (47%) had difficulty obtaining other forensic testing. Over one-third (36%) of these offices were located in counties having a population between 100,000 to 250,000. However, this problem was seen across the board in counties of all sizes. Over two-thirds (68%) of the public defenders responding to our questionnaire favored establishing a forensic laboratory which would be operated as an independent agency. Twenty-six percent (26%) strongly favored such a laboratory.

D. Expert Witnesses

A reputable expert witness is often critical to mounting an effective defense, especially when, for example, a defendant's sanity is at issue, or when issues involving forensic evidence are disputed. In such cases victory can often turn on which side's experts have the better credentials. While some public defender offices have budgeted funds from which to retain such expert assistance, other offices must obtain court approval for such assistance. Surprisingly, more than one-quarter (28%) of the offices reported having difficulty obtaining such approval. Moreover, even when such assistance is approved, there is still a lack of equality in funding

[46] Only three offices reported that such interviews were conducted "very often."

between the defender office and the district attorney's office. Over one-half (55%) of the public defender offices reported that they were handicapped by the lack of funds to match the district attorney's experts.

E. Assistance in Sentencing Mitigation

Over 61% of the public defender offices reported that the lack of expert assistance at the sentencing stage was a problem. The disparity among offices was striking especially with respect to the death penalty. Citing ABA Standards for Criminal Justice, the U.S. Supreme Court in *Wiggins v Smith*[47] and *Rompilla v Beard* [48] has established that it is imperative that defense counsel investigate "all reasonably available mitigating evidence" including family social history which may be relevant to reduce a defendant's sentence.[49] Only 8 offices had on staff, a person with a Masters degree in social work (MSW) to assist in such investigations. Even fewer offices (4) had a full-time death penalty mitigation specialist on staff. Nine offices which represented collectively 33 death penalty clients had no such staff assistance. While one of these offices was in a metropolitan county (over 1 million population), the majority were in counties having a population ranging from 100,000 to 500,000.[50] Only 11 offices had personnel specifically assigned to develop sentencing alternatives for clients in non-capital cases. While a bare majority (52%) of offices had paralegals on staff, 14 offices had no such staff assistance.

F. Training

Sixty one percent (61%) of the responding public defender offices reported that the lack of a full-time training director presented a problem and three offices felt this was a serious problem. These offices reported a need for training in basic trial skills, motion practice, jury selection, DNA and forensic evidence, handling expert testimony, mental defenses and immigration consequences of a guilty plea. Only a few offices reported that the lack of funds to attend training programs or the lack of training programs in their area was a significant problem. More defenders felt that the lack of time to attend training programs was a problem, which of course, is one of the ripple effects of excessive caseloads.

G. Qualifications and Supervision

When asked what level of experience was required before an attorney was assigned to a serious or violent felony, the majority (65%) of the public defender offices reported that they required three or more years experience. Eight offices, however, reported that 2 years or less experience was sufficient. There was a statistically significant correlation between having an excessive caseload and using attorneys with less than 3 years experience to handle serious felonies.[51] This was also true with respect to "three strikes" cases.

The impact of excessive caseloads is also aggravated when an office has to handle a death penalty case. Seventeen offices indicated that they handled one or more death cases during the last reporting period. Fourteen of these offices also reported having a significant to serious

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[47] 539 U.S. 510 (2003)
[48] 545 U.S. 374 (2005)
[49] See *Wiggins v Smith*, 539 U.S. 510 at 524-25, citing ABA Standards for Criminal Justice 4-4.1 and *Rompilla v Beard*, 545 U.S. 374 at 387, citing both the ABA Standards for Criminal Justice and ABA Guidelines for the Appointment and Performance of Counsel I Death Penalty Cases (1989).
[50] Four counties were class VI (100,000- 250,000) and three were class V (250,000-500,000).
[51] Chi-square (df=1), $p<.037$; n=23

problem with excessive caseloads. More startling was the fact that four offices, three of whom had actually handled a death penalty case during the last year, reported that they would allow an attorney with only 5 years experience to handle a capital case.

The California Rules of Court state than an attorney "must" have at least 10 years of litigation experience in the field of criminal law before being eligible to serve as lead counsel in a death penalty case.[52] The majority of responding offices indicated familiarity with this rule. However, the rule does not place a mandatory duty of compliance upon public defender offices.[53] Although the rule provides an alternate way to qualify for an attorney without 10 years experience, a number of defender offices reported that they had no set criteria for such cases. One office responded that they had not seen a death penalty case in 20 years. It would therefore appear that some offices may not be prepared to meet the requirements of Rule 4.117(d) if a death penalty case did arise in their county.

The majority of public defender offices formally evaluate their staff attorneys on an annual basis.[54] All offices used multiple methods of evaluation, which included: in-court observation (100%), judicial contact (77%) and review of closed case files (74%). Almost one-third (32.3%) of the offices had an official policy regarding review of an attorney's performance if a judicial finding was made that the attorney was ineffective. These policies were described as including an investigation into the cause, creation of a corrective action plan or re-training, and sometimes close monitoring of the individual attorney.

H. Independence

The ABA's Ten Principles state that a nonpartisan board of trustees should oversee public defender systems in order to safeguard their independence. None of the responding public defenders had such a board. All Chief Defenders are selected by the county board of supervisors, except San Francisco, where the Chief Defender is elected.[55] Almost three-fourths (74.2%) of the defenders reported that county board pressure was a problem. Over one-third (35%) indicated that this was a significant to serious problem. Even more disturbing was the fact that 90% of the public defenders reported that judicial pressure to expedite cases was a problem in their county. Sixty-one percent (61%) stated that this was a significant to serious problem, with five offices reporting this presented a serious problem.

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[52] Rule 4.117(d). The Rule further requires the attorney to have tried 10 serious or violent felonies including at least two murder trials, be experienced in the use of expert witnesses and have received special training in captital defense. The rule further states that meeting these minimum qualifications alone does not entitle an attorney to handle a death penalty case, since the court must also assess the attorney's background, experience and training and determine that he or she has "demonstrated the skill, knowledge and proficiency" necessary to competently represent a capital defendant. Rule 4.117(b).

[53] Subsection (g) of Rule 4.117 appears to exempt public defenders from this requirement saying only that the office "should" assign an attorney meeting the requirements of the rule.

[54] One office evaluates biannually and two evaluate every six months. One office reported that it conducted evaluations every six months for "three to four years" implying that after this time further evaluations were not done.

[55] In two cases the power to select the Public Defender was delegated to the county administrator.

I. Comments of Defenders

Defenders were asked what judicial or prosecutorial practices hindered their ability to provide effective representation. Uniformly there were complaints about prosecutors who delayed providing discovery and about judges who refused to sanction prosecutors for such tactics and yet pushed cases to trial "at rapid speed." Overcharging by prosecutors and "strong arm tactics" by judges "to assist [the] DA in pushing hard bargains" were also typical complaints. Several defenders also noted upon the lack of respect which judges have for the defense function. As one defender observed:

> Defense attorneys are criticized…while DA's …are given every courtesy. There is a general disdain by the judges toward criminal defendants and their counsel, which is reflected in their choice of words, demeanor, body language and rulings.

An experienced defender also pointed up the disparity that exists across the state in the quality of representation because each county can set its own standards:

> I have been a pubic defender for over 30 years in three different counties. There is a great disparity in the quality of defender services throughout the state. I think that statewide minimum standards - with teeth - should be established and every county should be required to meet these standards. A move in that direction exists in dependency representation. Why not for criminal defense? An alternative would be for the State to take over administration and funding for criminal defense services.

V. Data from Contract Defenders

Contract Defenders are the primary provider of indigent felony and misdemeanor representation in 24 counties. While this type of system is heavily concentrated in rural counties having populations of less than 100,000, it also exists in more urban counties. Some counties with a public defender office, for example, use a contract defender to handle conflicts. Eight counties have contracted with a single law firm, which, through branch offices provides various types of representation. Some counties contract with solo practitioners. Several counties, for example, have four different contract defenders handling different portions of the caseload and one county has seven separate contract defenders. The amount spent per capita for contract defender services ranged from a low of $5.85 to a high of $44.32.

We sent questionnaires to 57 separate contract defenders we had identified, and received 16 responses. Those responding represented a little over one-third of the counties having contract defenders as their primary indigent defense provider. One-half of these respondents were solo practitioners and half were law firms.

All but one of the contract defender reported that the inability to interview prosecution witnesses was a problem. Six respondents (two of whom were from the same county) had no staff investigators. Three reported that obtaining court approval for funds for an investigator was a "serious" problem. One office had only two investigators for 18 attorneys.[56] Seventy-one per

[56] National standards recommend a ratio of one investigator for every three attorneys.

cent (71%) of these contract defenders reported that they rarely or occasionally interviewed key witnesses prior to a preliminary hearing.

The majority indicated that they were appointed at arraignment and contacted the defendant within one to three days after arrest. Three reported that they did not contact an in-custody felony defendant until more than five days after arrest. The majority reported that they most frequently settled a felony case at a disposition conference held prior to the preliminary hearing.

Only one office had a full-time staff member with an MSW degree to assist in sentencing and only three offices reported having paralegals.[57] One-half of the contract defenders indicated that the lack of expert assistance at sentencing was a significant to serious problem. One office, which had handled a death penalty case during the year, did not have a mitigation specialist on staff or even a paralegal. This office reported having a "serious" problem in obtaining court approval for experts and stated that withholding of *Brady* evidence by the prosecutor and judicial pressure to expedite cases were also "serious" problems. A majority of the contract defenders also indicated that delayed discovery as well as *Brady* violations were a problem in their county.

A majority of the responding contract defenders had felony caseloads exceeding 150 felonies per year. Although all of these defenders indicated excessive attorney workload and investigator workloads were a problem, the majority considered it a minor or moderate problem.

All but one of the contract defenders thought that the disparity between their pay scale and that of the district attorney's was a problem. Eighty-six per cent (86%) viewed this disparity in compensation as a significant to serious problem. By contrast only 39% of the public defenders reported having a lack of parity with the prosecutor's office.

None of the contract defenders reported having a serious problem with training. Although they are from some of the most rural counties in the state, only two indicated that the lack of training programs in their area was a significant problem. Three reported that the lack of funds to attend training programs was a significant problem. Only four reported having any training needs. The topics noted were: advocacy/trial techniques, mental health, sentencing, evidence, and sex crimes.

A majority reported that the lack of funds to match the prosecution's experts, and difficulty in obtaining DNA and other forensic testing was a significant problem. The majority also favored establishing an independent forensic laboratory, with only one indicating "disfavor" and four expressing "no preference."

There was a general lack of uniformity in the level of experience attorneys were required to have before being allowed to represent clients charged with serious felonies. One office reported that only one year of experience was needed to handle a serious felony or three strikes case. Three offices reported that at least 3 or 4 years would be required, while one said 5 years, one 10 years, and one reported that all attorneys in their office had 20+ years experience. Over one-third (37%) of the contract defenders did not answer this question.

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[57] One office reported having a part-time MSW on staff.

Two-thirds of all judges responding to our questionnaire believed that an attorney should have at least 3 or more years experience before representing a client charged with a serious felony. More than one-third of the judges, and several certified criminal defense specialists from counties employing contract defenders, indicated that the contract defender attorneys were less experienced than the district attorneys in their county. It should be noted that judges and certified specialists from counties with defender offices and assigned counsel systems also reported the same problem in those systems.

Monitoring and supervision of contract defender attorneys also varied widely. Where a county contracts with a solo practitioner there is no supervision at all other than the judiciary. However, judges have little incentive to encourage aggressive advocates who will only make disposing of cases more difficult and increase their workload. While most responding contract defenders who indicated that they were a law firm had some type of formal review process, one indicated this only entailed contacting judges for their evaluation. Several offices had no formal review process. Only one contract office had an official policy in place to deal with an attorney who was ineffective.

All but one of the responding contract defenders indicated that pressure from the county board of supervisors to keep costs down and judicial pressure to expedite cases presented problems. While the county board in most cases selects the contractor, several respondents noted that the board only appointed who the judges approved. This practice of judicial involvement in selecting the contractor was also confirmed by a number of judges who indicated that either the judge or a judicial committee selected the contract defender in their county. None of the contracts were for longer than a three year period. Based upon judicial responses it appears that the amount of compensation awarded is often based upon a fixed fee per case, or a flat fee for the expected annual caseload.

While a contract system can be a cost-effective means of delivering indigent defense services in rural areas having low caseloads, California has a had an unfortunate history with such contracts. In a monograph prepared for the U.S. Justice Department's Bureau of Justice Assistance the following disastrous experience with a contract defender was reported:

> In 1997 and 1998, a rural county in California agreed to pay a low bid contractor slightly more than $400,000 a year to represent half of the county's indigent defendants. The contractor was a private practitioner who employed two associates and two secretaries, but no paralegal or investigator. The contract required the contractor to handle more than 5,000 cases each year. All of the contractor's expenses came out of the contract. To make a profit, the contractor had to spend as little time as possible on each case. In 1998, the contractor took fewer than 20 cases—less than 0.5 percent of the combined felony and misdemeanor caseload—to trial.
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> One of the contractor's associates was assigned only cases involving misdemeanors. She carried caseload of between 250 and 300 cases per month.[sic][58] The associate had never tried a case before a jury. She was

[58] The national standard is 400 misdemeanor cases per attorney per year.

> expected to plead cases at the defendant's first appearance in court so she could move on to the next case. One afternoon, however, the associate was given a felony case scheduled for trial the following week. The case involved multiple felony and misdemeanor charges. When she looked at the case file, the associate discovered that no pretrial motions had been filed, no witness list had been compiled, no expert witnesses had been endorsed, and no one had been subpoenaed. In short, there had been no investigation of any kind into the case, and she had no one to help her with the basics of her first jury trial.
>
> The only material in the case file was five pages of police reports. In these reports she found evidence of a warrantless search, which indicated strong grounds for suppression. She told the judge she was not ready to proceed and that a continuance was necessary to preserve the defendant's sixth amendment right to counsel. The continuance was denied. The associate refused to move forward with the case. The contractor's other associate took over the case and pled the client guilty to all charges. The associate who had asked for a continuance was fired.
>
> In this California county, critics' worst fears about indigent defense contract systems came true. When contract systems are created for the sole purpose of containing costs, they pose significant risks to the quality of representation and the integrity of the criminal justice system.[59]

In light of this and other reported experiences where a county solicited a bidding war and accepted an extremely low bid offer,[60] it is recommended that state contracting law be amended to require that contracts for indigent defense services specify:

1) minimum qualifications for attorneys
2) workload standards for attorneys and investigators
3) a plan showing how staff attorneys will be supervised, and
4) a case management information system for ensuring that the contractor's performance can be monitored by outside auditors.

We also believe that awarding contracts on the basis of a flat fee contract creates an inherent conflict of interest because of the economic incentives to maximize profits. Allowing competitive bidding for such contract creates further pressures to provide the bare minimum in services, especially when the contract is open-ended with respect to the number of cases the contractor might be required to take. Therefore, is it also recommended that contracts for indigent defense services be awarded on a cost-plus basis for a pre-determined number of cases. Under this system the contractor would have to set forth the costs for the attorneys, investigators,

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[59] Contracting for Indigent Defense Services - A Special Report, Prepared for the U.S. Justice Department, Bureau of Justice Assistance, April, 2000, 1-2.

[60] See Jocelyn Wiener, Placer Swaps Legal Teams: Choice of law firm to serve indigent defendants stirs up controversy, Sacramento Bee, June 28, 2006, Metro/Regional News at sacbee.com. Placer County Minutes for June 27, 2006, page 119 reflect that the initial bid of the existing contract defender was $28,000,000 while the initial bid of the ultimate winner was $15,000,000, almost 50% less. The low bid firm was ultimately successful. During the bidding process the low bid firm revised its original bid upward to $16, 830,255.

and other support staff, to handle a specified caseload, meeting the requirements of the workload standards noted above.

VI. Assigned Counsel Systems

Only San Mateo county uses an assigned counsel system administered by the local bar association as the primary provider of indigent defense services. However, assigned counsel systems exist in virtually every county in order to handle multiple defendant cases. Over 60% of the certified criminal defense specialists across the state who responded to our questionnaire had been appointed to represent an indigent accused during the past year. While the majority indicated they were selected by an assigned counsel panel administrator, some indicated that they were selected directly by the court.[61] While the majority were notified of their appointment within three days after arrest, more than one in four (29%) indicated it could be more than four days after arrest.

The method of compensation varied widely. Sixty-five percent (65%) of the certified specialists indicated that they were paid an hourly rate as appointed counsel. The amount ranged from a low of $40 an hour to a high of $125 an hour for a non-capital felony, excluding trial. Over 80% of these respondents reported the normal hourly rate was less than $100 per hour. In some counties there was a cap on the number of hours. In other counties assigned counsel were paid a flat fee per case including trial. A number of counties use a combination of methods, paying a base amount per case and then additional amounts per event such as a preliminary hearing. Assigned counsel were compensated at trial by either a fixed amount per day or by an hourly rate.

Over one-half (55%) of the certified specialists reported that the fee structure in their county did not give adequate incentives to investigate, research, and bring appropriate motions before disposition. An even higher number believed that their fee structure did not adequately compensate an attorney who took a case to trial. By contrast, only 10% of the judges believed that assigned counsel fees were inadequate to investigate cases. However, one in five admitted that the fees were not adequate to compensate an assigned attorney who went to trial. It should be noted that all of the respondents from San Mateo County, which has a finely tuned system of compensation, providing a base fee per case plus additional payments per event and trial, indicated that this fee structure was adequate. The disparity between the amount spent on indigent defense and prosecution in San Mateo is less than $5.00 per capita.

Obviously an appointed attorney who is not adequately compensated for his or her time will have little incentive to provide adequate representation. As one assigned counsel panel member explained, the economic incentives created pressure to quickly dispose of the case at the initial disposition conference, stating: "Once I move beyond the disposition conference, I'm losing money." We have therefore recommended that P.C. § 987.2 be amended to provide that the amount of compensation for assigned counsel be determined by a panel comprised of members appointed by the judiciary, county board of supervisors, and the local bar association.

[61] A number of judges responding to our questionnaire also indicated that they or a panel of judges picked assigned counsel although in one county this was done by the court clerks using a rotation system.

VII. Conclusion:

The recently established California Innocence Project has already obtained the release of five innocent men from prison. These exonerations, along with the more than 200 other exonerations by innocence projects across the country, are symbols of a system that is deeply flawed. Even in counties in California that are among the richest in the nation, we have a system that has broken down, because we have broken tradition with a basic principle: the presumption of innocence. Instead, with increasing insistence, our criminal justice system operates under a presumption of guilt. That perception, coupled with the escalating cost of providing counsel for the indigent accused, has led us to design a system where processing the "presumed guilty" as cheaply as possible has been made a higher priority than investigating the possibility of innocence.

Our research and survey data have documented that the failure to investigate has been a major cause of ineffective representation. There is a tendency to blame this failure on the lawyers. Narrowly focusing upon the errors of individual attorneys, however, ignores the wider systemic conditions that can give rise to such errors. The impact caused by the lack of adequate resources for investigation on the ability to mount an effective defense can be seen in a three strikes case from one of our major metropolitan counties. The public defender, who had 12 years experience, was found ineffective for failing to interview two eyewitnesses to an alleged carjacking. These witnesses contradicted the prosecution's sole witness on critical facts. It appears that the public defender did attempt unsuccessfully to contact one witness by phone, but an investigator was never sent to his known address. Although blame was laid on the head of the attorney, a substantially contributing cause of this failure to investigate may have been the lack of adequate resources. One hundred percent (100%) of the public defender offices responding to our survey indicated that excessive investigator workloads were a problem. Also, almost three-fourths of the certified criminal defense specialists, when asked to assess the health of the public defender system in their county, reported that the lack of investigative resources was a significant problem. One in four of these independent observers reported that excessive public defender workloads were a serious problem in their county. By continuing to tolerate excessive attorney and investigator workloads, we continue to run the unnecessary and unacceptable risk that an innocent accused will be wrongfully imprisoned or executed.

The institutional public defender office is, in theory, the most effective delivery mechanism for providing quality representation in a cost effective manner. Its capacity to develop and maintain skilled expertise, furnish comprehensive training and supervision, and provide the supportive environment necessary for effective representation is without equal. But until we reduce the glaring disparity in the resources allocated to prosecutors and defenders, we destroy the promise of that system to provide the effective assistance of counsel guaranteed by the Constitution.